GRIBBLES PATHOLOGY (M) SDN BHD

v.

ADVENTIST HOSPITAL & CLINIC SERVICES (M) BHD (NO 2)

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-751-99]
17 DECEMBER 2002

CIVIL PROCEDURE: *Contempt of court - Order of commital, application for - Procedural requirements, whether complied with - Indorsement of penal notice on order sought to be enforced, whether mandatory - Whether failure to indorse penal notice fatal to motion to commit - Distinction between order requiring performance of act and order prohibiting an act - Rules of the High Court 1980, O. 45 r. 7(3), (4), (5), (6)*

This was a motion by the plaintiff (two motions heard together) to commit the directors of the defendant to prison for failing to comply with the injunction and/or orders issued by the court on 13 October 1999. At the outset of the commital proceedings, the defendant raised the preliminary objection that the plaintiff did not indorse a penal notice (Form 87) on the order sought to be enforced as was required by O. 45 r. 7(4) of the Rules of the High Court 1980 ('RHC').

Held:

[1] It was clear that the injunction and/or orders issued by the court on 13 October 1999 required the defendant to perform certain acts (as opposed to abstaining from doing certain acts solely). Order 45 r. 7(4)(b) was, therefore, applicable and mandatory. Consequently, the plaintiff's failure to indorse a penal notice (Form 87) on the order sought to be enforced was fatal to its motion to commit the defendant to prison. (pp 323 f-h & 324 a-e)

[Defendant's preliminary objection upheld; plaintiff's motion dismissed.]

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 ***(refd)***

Arumugam v. Suppiah Chettiar [1935] MLJ 4 ***(foll)***

Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 ***(foll)***

Messrs Hisham, Sobri & Kadir v. Kedah Utara Development Sdn Bhd & Anor [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5 ***(foll)***

Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (No 2) [1998] 3 CLJ 841 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 45 r. 7(3), (4), (5), (6)

For the plaintiff - JA Yeoh (Kiley Tan & Harminder Kaur Gill); M/s Shearn Delamore & Co

For the defendant - Karpal Singh (Jagdeep Singh Deo); M/s Karpal Singh & Co

[The plaintiff has filed two appealed to the Court of Appeal vide Appeal Nos: P-02-887-02 & P-02-888-02]

Reported by Gan Peng Chiang

JUDGMENT

RK Nathan J:

Facts

There are two motions for commital taken together in this case. In encl. 63 the plaintiff herein took out a motion to commit three local directors of the defendant for their contempt in refusing and/or failing to obey or comply with the order of injunction issued by this court on 13 October 1999 and for the said directors to pay the costs.

Enclosure 63

The plaintiff is in the business of establishing and operating laboratories and in conducting medical and pathological testing services in their own laboratories and through several hospitals in Malaysia. The defendant owns and operates a private hospital known as the Penang Adventist Hospital. By an agreement dated 15 September 1997 entered into between the plaintiff and the defendant, the defendant agreed to allow the plaintiff to operate and maintain the defendant's on site laboratory at the Penang Adventist Hospital for the provision of a 24 hour on-site laboratory service at the said hospital. On 13 October 1999 the High Court had granted by consent of both the plaintiff and the defendant an injunctive order restraining the defendant from:

(a) terminating or attempting to terminate the agreement dated 15 September 1997 entered into between the plaintiff and the defendant in respect of the plaintiff's operation and maintenance of the on-site laboratory at the Penang Adventist Hospital and/or withholding, withdrawing, suspending and/or curtailing in any way the rights, entitlements and benefits enjoyed by or due to the plaintiff as the contractor named therein in the said agreement;

(b) Impeding or attempting to impede the plaintiff, their employees, servants or agents from having access to the on-site laboratory at the Penang Adventist Hospital;

(c) establishing or attempting to establish another laboratory at the Penang Adventist Hospital or permitting any third party in establishing a collection centre at the said Hospital;

(d) acting or continuing to act on the defendant's letter dated 13 August 1999 in respect of the purported termination of the plaintiff's services as set out in the said agreement dated 15 September 1997 and/or taking, continuing, directing or suffering to be taken or be continued any actions with a view to effecting or enforcing the said letter dated 13 August 1999.

The plaintiff alleged that the said local directors of the defendant had failed to obey or comply with the said order namely:

(i) in refusing and/or failing to make payment of the plaintiff's invoices in respect of tests conducted for the period between May 1999 to 20 October 2000 totalling RM2,142,811.50 although the defendant had not shown any inconsistency between the plaintiff's invoices and the defendant's records in the manner as provided for under the said agreement and in breach and/or in disregard of para. (i) (a) of the said Order of Injunction notwithstanding that payment had eventually been effected following the execution of the said summary judgment dated 30 August 2001 against the defendant;

(ii) in refusing and/or failing to make payment of the plaintiff's invoices totalling RM2,790,259 in respect of tests conducted for the period between 21 October 2000 to 1 April 2002 although the defendant had not shown any inconsistency between the plaintiff's invoices and the defendant's records in the manner as provided for under the said agreement and in breach and/or in disregard of para. (i) (a) of the said Order of Injunction.

(iii) in refusing and/or failing to make payment to the plaintiff of such sums as appear by the defendant's record to be due and outstanding to the plaintiff whether upon verification of the correctness of the plaintiff's invoices and/or the defendant's records in the manner as provided for under the said agreement and in breach and/or in disregard of para. (i)(a) of the said Order of Injunction;

(iv) in refusing and/or denying the plaintiff's right to a price increase limited to an average of 10% per annum over the test base range for all tests conducted with effect from 9 November 1999 in the manner as provided for under the said agreement and in breach and/or in disregard of para. (i)(a) of the said Order of Injunction;

(v) in refusing and/or failing to comply with the plaintiff's request that the matter of the test price increase or any difference or question incidental thereto over the test price increase be resolved at the least by way of arbitration in the manner as provided for under the said agreement and in breach and/or in disregard of para. (i)(a) of the said Order of Injunction.

Enclosure 69

By encl. 69 the plaintiff sought to commit four local directors (inclusive of the three referred to in encl. 63) of the defendant also for their contempt in refusing and/or failing to obey or comply with the same order of this court dated 13 October 1999 and for the said directors to pay the costs.

The plantiff alleged that the said local directors of the defendant had failed to obey or comply with the said order dated 13 October 1999 namely:

(i) in collecting the specimens from the defendant at the premises of the said Hospital for laboratory tests at the said business premises of the said B.P. Clinical Lab. Sdn. Bhd. at Suite G-1, Menara Penang Garden, 42A, Jalan Sultan Ahmad Shah, 10050 Penang (hereinafter referred to as the 'said business premises') in breach of the plaintiff's rights and entitlements under the said agreement dated 15 September 1997, thereby breaching and/or disregarding para. (i)(a) and (c) of the said Order of Injunction;

(ii) in receiving from the defendant the specimens for laboratory tests at the said business premises in breach of the plaintiff's rights and entitlements under the said agreement dated 15 September 1997, thereby breaching and/or disregarding para. (i)(a) of the said Order of Injunction;

(iii) in inducing and/or compounding the continuing breach or non-compliance of the said Order of Injunction on the part of the defendant by receiving and/or collecting the specimens from the defendant for laboratory tests at the said business premises in breach of the plaintiff's rights and entitlements under the said agreement dated 15 September 1997, thereby breaching and/or disregarding paras. (a) and (c) of the said Order dated 13 October 2002.

Preliminary Objection

At the outset of the commital proceedings, Mr. Karpal Singh raised a preliminary objection in relation to both enclosures. Mr. Yeoh confirmed that notice had been given. The objection was that there was a failure to include a penal indorsement as required by O. 45 r. 7(4) of the Rules of the High Court 1980.

Order 45 r. 7(4) reads as follows:

> There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:
>
> (a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

The said r. (4) prescribes that a penal indorsement as stated in Form 87 must be included in the order sought to be enforced. It is also pertinent to see the prescribed Form 87 which reads as follows:

> No. 87
>
> NOTICE ON CERTAIN JUDGMENTS (O. 45 r. 7) The indorsement should be in the following words or words to the following effect:
>
> (a) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time:
>
> If you, the within-named ... (or ...) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.
>
> (b) In the case of a judgment or order requiring a person to abstain from doing an act:
>
> If you, the within-named ... disobey this judgment (or order), you will be liable to process of execution for the purpose of compelling you to obey the same.

(c) In the case of a judgment or order requiring a body corporate to do or to abstain from doing the act, but it is sought to take enforcement proceedings against a director or other officer of that order.

> If ... neglect to obey this judgment (or order) by the time therein limited (or in the case of an order to abstain from doing an act, if ... disobey this judgment (or order), you (a director or officer of the said ...) will be liable process of execution for the purpose of compelling the said to obey the same.

Findings Of The Court

The earliest case relating to this issue is that of *Arumugam v. Suppiah Chettiar* [1935] MLJ 4. In his defence to the plaintiff's claim, the defendant in Arumugam pleaded that a sum of RM4,776 had indeed been paid. The plaintiff delivered interrogatories asking for particulars of the said payment. Since no answer was delivered the registrar ordered the defendant to answer the interrogatories within seven days. Being dissatisfied with the answers filed by the defendant, the plaintiff took out a summons requiring the defendant to within four days from the date of the order to be made, file a further affidavit fully and sufficiently answering the interrogatories. The court made an order accordingly on 9 September 1932. The defendant again having failed to comply, the plaintiff took out a summons for an order that the defence be struck out and that the defendant be placed in the same position as if he had not defended. The court granted this order on 28 October 1932. On appeal against the decision given on 28 October 1932 the then Court of Appeal held that since the service copy of the order granted on 9 September 1932 did not contain an endorsement of the memorandum under s. 560 of the Civil Procedure Code, which was taken directly from the English O. 41 r. 5 and which read as follows:

> Every judgment or order made in any cause or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words to the effect following:
>
> > If you, the within-named A.B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order).

The order made on 28 October 1932, striking off the defence, was set aside. The court believed that the required endorsement was never made on 9 September 1932 and that was why the service copy of the order did not have it and the failure to draw the attention of the defendant to the punitive endorsement was held fatal to the plaintiff's case.

In *Messrs. Hisham, Sobri & Kadir v. Kedah Utara Development Sdn. Bhd. & Anor* [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5, where directors were also sought to be committed to prison for the alleged contempt of court for having breached their undertaking, the court dismissed the motion to commit *inter alia* on the ground that the period to be endorsed as required under O. 45 r. 7(4) had not been complied with.

Edgar Joseph Jr J (as he then was) relied on the earlier case of *Arumugam* and held the application for commital fatally flawed. In *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 466, Mohd. Hishamudin J, in a well thought out judgment on this point declined to be pursuaded by the Supreme Court's decision in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia. Bhd. & Ors.* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58. In *Arthur Lee* Mohamad Azmi, SCJ in delivering the judgment of the court made the following observations:

> There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in O. 52 of the RHC 1980 in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under O. 52 of the RHC 1980 which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the court.

Mohd. Hishamudin J declined to follow the above *dicta* "for the simple reason that in the above case the Supreme Court was not dealing with a case where there had been an omission of the penal indorsement on the order."

In *Syarikat Perumahan Pegawai Kerajaan Sdn. Bhd. v. Sri Komakmur Sdn. Bhd. (No. 2)* [1998] 3 CLJ 841, on a similar issue, I said as follows at p. 846:

> Pursuant to O. 45 r. 7(3)(b), an order requiring a body corporate to do an act shall not be enforced unless the copy has been so served before the expiration of the time within which the body was required to do the act. Sub-rule (4) says that there must be an indorsement on the copy of an order served under this rule, that is a notice in Form 87 informing the person on whom the copy is served as and is required by sub-rule 4(b) that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it. These are mandatory requirements, a breach of which will render any application to commit, impotent.

Pursuant to sub-rule (5), the copy of the order required to be served under this rule must be served on the person required to do the act. However, pursuant to sub-rule (6) where the person to be served with the order is required to abstain from doing an act, he need not be served personally with the order nor need there be a penal notice indorsed on the order provided the court is satisfied that he has notice of the order either by being present when the order was made or by being notified of the terms of the order, whether by telephone, telegram or otherwise.

There is a clear distinction between a body corporate or an individual, having to do an act, and abstaining from doing an act. In the case before me, the defendant was required to specifically perform the contract within 30 days to remove the squatters. Clearly, the mandatory requirement of the need to indorse the punitive sanction in the order has to be complied with. The reason is obvious. If a party is required to do an act, he has to exert energy and time and effort to comply with the order. The reality of punitive sanctions being imposed will no doubt jolt the recalcitrant to immediate action and it is with this in mind that the indorsement of punitive sanction becomes a mandatory requirement. It is my judgment that the requirement for a penal notice will only apply where the judgment or order on which the commital proceedings are launched, is a positive order in the sense that it requires a person to do some act. On the other hand, where the order is prohibitory, that is, where the order directs a defendant not to do an act, the absence of the penal notice in the order is not fatal so long as the court is satisfied that the party restrained has notice.

Looking at the order made on 13 October 1999 it is clear that the said order on which the commital proceedings in respect of both enclosures had been launched, certainly requires the person to do positive acts. In the circumstances I dismissed encls. 63 and 69 with costs.